Supreme Court, U. S.
FILED
DEC 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-76

State of South Dakota,

Petitioner,

—v.—

Donald R. Opperman,

Respondent.

BRIEF OF PETITIONER

WILLIAM J. JANKLOW
Attorney General of South Dakota

EARL R. METTLER
Assistant Attorney General
Attorneys for Petitioner

State Capitol Building
Pierre, S.D. 57501

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BRIEF OF PETITIONER

I. OPINION BELOW

The opinion of the Supreme Court of South Dakota is reported at 228 N.W. 2d 152 (1975).

II. GROUND ON WHICH JURSIDICTION IS INVOKED

The judgment of the South Dakota Supreme Court was

entered on April 15, 1975. The Petition for Writ of Certiorari was filed within ninety (90) days of that date. The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

III. QUESTION PRESENTED

Whether the South Dakota Supreme Court erred in holding inadmissible evidence found in the glove compartment of a vehicle during an inventory of the contents of the vehicle by police, which inventory followed the lawful impoundment of the vehicle for parking violations, on the ground that the inventory was an illegal search under the Fourth Amendment of the United States Constitution.

IV. CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provision involved is the Fourth Amendment of the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

V. STATEMENT OF THE CASE

During the early morning hours of the 10th day of December, 1973, a Vermillion, South Dakota, police officer issued a parking ticket to an automobile pursuant to a Vermillion ordinance which prohibits parking in the downtown area from 2:00 A.M. to 6:00 A.M. At approximately 10:00 A.M. on the morning of December 10th, a meter maid for the City of Vermillion issued another ticket to the automobile for an expired parking meter violation. After completing her rounds, the meter maid returned to the station and informed police officer Robert Frank that the vehicle had been issued another ticket. (R. 61, 66-67).

Officer Frank then went to the vehicle and inspected the tickets. He called the towing service which was on call to the department that month and had the car towed to the city impounding lot. (R. 72, 73, 76).

The impounding lot had been the scene of past incidents of theft from locked cars kept there. Officer Frank observed a watch and numerous other items inside the car on the dashboard and on the backseat. (R. 33, 74, 76).

The officer then inventoried these items pursuant to the standard police department procedure. Using a tool kept by the tow truck operator, the officer unlocked the car and filled out a standard inventory sheet. The inventory covered the exterior condition, the seats, floor, and dashboard of the car, and the console glove compartment, which was closed but not locked. A quantity of marijuana was found in the glove compartment. (R. 74-79).

At 5:00 P.M. that day, Donald Opperman, the registered owner of the vehicle, appeared at the Police Department and received from the police the items of personal property that were not seized. (R. 93, 94).

A complaint charging Mr. Opperman with possession of less than one ounce of marijuana was issued on the 20th day of December, 1973. On that date, he was arrested and taken before a magistrate.

At a trial held on February 21, 1974, Mr. Opperman was convicted of the above offense.

ARGUMENT

EVIDENCE FOUND IN THE GLOVE COMPARTMENT OF AN IMPOUNDED AUTOMOBILE DURING AN INVENTORY OF ITS CONTENTS IS ADMISSIBLE UNDER THE FOURTH AMENDMENT BECAUSE THE INVENTORY PROCEDURE IS CONSTITUTIONALLY REASONABLE.

When law enforcement officers lawfully seize and impound an automobile following a traffic accident or traffic violation, or other noncriminal circumstance, evidence observed by an officer while driving the automobile or securing it is admissible in a criminal prosecution. *Harris v. United States*, 390 U.S. 234 (1968).

This case presents the question of whether the same is true for evidence found in the glove compartment of an impounded automobile while an officer is securing the property inside the automobile.

It is the position of the State of South Dakota, the petitioner, that the practice of making a list of the property inside of an impounded automobile and removing it for safekeeping is a reasonable practice under the Fourth Amendment. This included securing the property in an unlocked area within the automobile, such as the glove compartment.

The inventory procedure followed in this case is reasonable because it is an intrusion of limited scope into an area where there is not a reasonable expectation of absolute privacy, and the intrusion is for a noninvestigative purpose.

An inventory is not a search for Fourth Amendment purposes because it is not conducted with the intent to discover evidence of a crime. *Cf. Wyman v. James*, 400 U.S. 309 (1971). See also *People V. Sullivan*, 29 N.Y. 2d 69, 323 N.Y.S. 2d 945, 272 N.E. 2d 464 (1971). Whether or not it is characterized as a search, it is an intrusion which is reasonable under the Fourth Amendment. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Wyman v. James, supra.*

In *Cady v. Dombrowski*, 413 U.S. 433 (1973), a case which involved a warrantless search of an automobile in police custody thought to contain a weapon, this Court noted it was unnecessary to consider the question of whether or not the procedure was a search, because the case was governed by *Harris v. United States*, 390 U.S. 234 (1968), and other cases. *Cady*, 413 U.S., at 442. Here again, the question of whether to attach

the "search" label to the police conduct is largely semantic.

In *Harris* and in *Cady*, the incriminating evidence was found inadvertently by an officer while engaged in a police function that was a constitutionally reasonable intrusion. An inventory of an impounded automobile which includes the contents of an unlocked glove compartment is also constitutionally reasonable conduct.

The Fourth Amendment provides that government actions shall not unreasonably invade the privacy and security of a citizen. *Terry v. Ohio*, 392 U.S. 1 (1968). It further provides that when a coercive invasion of privacy, a search, must take place, it must be reasonable. *Wyman v. James*, 400 U.S. 309 (1971). When the invasion is a search for criminal evidence, there must be probable cause.

Thus, a government invasion into the privacy of persons, houses, papers, and effects is limited by the Fourth Amendment, but this amendment does not come into play when the "effects" are not placed before government eyes as a result of government conduct, but only come to the attention of the government through inadvertence or other circumstances. If the entire set of circumstances which bring one's "effects" to the attention of the government include some government action, that action must be reasonable. Thus in *Harris*, supra, the officer had to have been justified in being at the place from which the plain view observation was made. His conduct in arriving at that position must be reasonable, and must not jeopardize the privacy and security of a citizen.

In both *Harris* and *Cady*, the respective intrusions into the automobiles were reasonable. In *Cooper v. California*, 386 U.S. 58 (1967), which involved an inventory of the glove compartment of an automobile held for forfeiture, the intrusion was also reasonable. Petitioner submits that the intrusion in the present case was, similarly, a reasonable one.

The most important factor indicating that the conduct was reasonable is the purpose of the procedure. In this case, the inventory procedure was conducted for a noninvestigative

community care-taking purpose. As in *Cady*, noncriminal contact with automobiles brought local officials in plain view of the evidence. *Cady*, supra, 413 U.S. at 442.

While the fact that the purpose was noninvestigative and was not to find incriminating evidence may not automatically validate the procedure for Fourth Amendment purposes, it is a strong indication of reasonableness. It is unlikely that police action designed to serve a noncriminal, community caretaking function will be unreasonable.

If the police conduct, although not for purposes of criminal investigation, constitutes an arbitrary intrusion for no reason or a random harassment of citizens, it is unreasonable. But where the intrusion serves a legitimate noncriminal purpose, it may be presumed not to violate the Fourth Amendment. *Wyman, supra.*

In the present case there is no indication that the motive was anything other than to itemize and secure the property in the automobile against theft. The record indicated that the investigating officer did not know the Defendant, had not seen the automobile before, and had no reason to think the automobile might contain incriminating evidence. The South Dakota Supreme Court considered the question of motive as one which created an anomaly because an individual's automobile could be inventoried when there was no indication of criminal conduct, but if he was suspected of criminal conduct there would have to be probable cause for a warrant. Petition for Certiorari, page 17. This anomaly was discussed in *Camara v. Municipal Court*, 387 U.S. 523 (1967).

In fact, however, if the limited inventory to secure personal property is held constitutionally permissible, no such discrepancy will exist. If the police have such custody of an automobile as makes it reasonable for them to use an inventory procedure to secure the property inside it, they may do so whether or not the owner is suspected of criminal activity. If they go beyond those steps which are reasonable to secure the property, either because they are suspicious of the owner or for

any other reason, the additional intrusion will be deemed unreasonable. As one lower court has said in upholding an inventory,

> We are conscious, too, of the possibility that the police, in some circumstances warranting some limited form of inventory search, and they often conduct searches which range beyond what is required by any legitimate police need. (Citations omitted). But we are confident that here, as in other contexts, reviewing courts will be fully capable of assuring that the scope of the intrusions involved will be tailored to the specific public interests which lie at the root of the finding that the intrusions are reasonable.

United States v. Gravitt, 484 F. 2d 375 (5th Cir. 1973), cert. denied, 414 U.S. 1135 (1974). Thus there will be no discrepancy in treatment between those suspected of criminal behavior and others whose automobiles come into contact with the police. Where a noncriminal caretaking inventory is warranted, it may be conducted in either case, but its scope must be reasonable in light of its limited, noninvestigative purpose.

The noncriminal purposes of the procedure followed in this case have been recognized in prior decisions of this Court. These purposes are safeguarding the property of the owner, protecting the public, and insuring the safety and protection of the custodians of the automobile. *Harris*, supra; *Cooper*, supra; *Cady*, supra.

In addition to the element of noncriminal community caretaking purpose, other factors warrant the conclusion that the conduct was reasonable. The procedure followed was a standard police procedure, uniformly applied to all impounded vehicles. This is reasonable police conduct and also is a factor indicating the absence of any investigative motive. The officer conducting the inventory completed a standard police form. The inventory covered the exterior condition of the automobile, the seats, floor, and dashboard of the car, and the glove compartment. These are all plain view areas, with the

exception of the unlocked glove compartment. There is no indication in the record of any intrusion into the trunk, or into a locked suitcase, bound parcel, etc.

Thus the procedure in this case was of limited scope, reasonably suited to the purpose for the intrusion. This case does not present the question of whether opening a locked trunk or other locked areas is reasonable to secure the property. In general, it is submitted that the scope of an inventory to protect property is limited by the need to describe the property with sufficient detail to list it, and the need to secure the property sufficiently to guard against theft. Whether, for example, opening a locked suitcase instead of merely removing it is a reasonable step to secure the contents of the suitcase, is a question left for later cases. However, the contents of an unlocked glove compartment are as accessible to an intruder as are items in plain view. Securing the contents of an unlocked glove compartment is a reasonable step to be taken in order to safeguard the contents of the automobile.

In the present case, the procedure is further made reasonable by the conditions of the impoundment of the automobile. The vehicle was impounded by a small town police force which presumably could not have assigned officers to guard the vehicle around the clock. See *Cady, supra,* 413 U.S. at 447. The record shows that the impound lot had been the scene of prior thefts from vehicles. The possibility of theft warranted the removal of the property most easily stolen from the vehicle. The minimal intrusion used to secure this property was reasonable in light of the need to secure it.

It is sometimes asserted in regard to inventories that because the search is, in part, to protect the owner of the automobile, the procedure goes too far or is improper if it results in a detriment to the owner, such as the admission of evidence against him. 20 Vill. L.R. 147, at 162. This is an unusual approach to the function of law enforcement authorities. If a police officer checks the door of an establishment while on patrol, for example, and observes illegal activity inside, it is

irrelevant that the owner of the building, the person the officer was trying to protect, is the person observed. If a routine police function puts an officer in a position to observe illegality, it cannot matter that the observation incriminates the person intended to be protected by the police activity. The fact that an inventory may yield evidence against the owner although intended to protect the owner is not relevant to whether it is constitutionally reasonable.

If this criticism of inventories has any validity at all, it might preclude an inventory where the owner requests that no inventory be conducted. In this case, however, the owner was not available to be consulted. Because the police did not know when, if ever, the vehicle would be claimed, it was reasonable for them to follow their normal procedure and inventory the property inside it.

Finally, the inventory procedure is a reasonable one because of the area upon which the intrusion is made. An automobile is an "effect" for Fourth Amendment purposes. *Cady, supra,* 413 U.S., at 439. Thus, an individual does not lose the right of privacy provided by that amendment when he enters his automobile. However, the relevant question for purposes of the reasonableness of a search is what expectation of privacy one may legitimately have in the area searched. *Katz v. United States,* 389 U.S. 347 (1967).

For this purpose there is a constitutional difference between houses and automobiles. *Cady, supra,* 413 U.S., at 439; *Chambers v. Maroney,* 399 U.S. 42 (1970). The expectation of privacy in an automobile is reduced because police are likely to have considerable contact with automobiles "for reasons related to the operation of the vehicles themselves." *Cady,* at 441. This contact results from the extensive regulation of vehicles and traffic and the frequency with which a vehicle can become disabled or involved in an accident on public highways. *Cady,* at 441. Extensive and often noncriminal contact with automobiles may bring local officials in plain view of evidence. *Cady,* at 442. For instance, a search may be conducted incident to an arrest

for a traffic violation, which search could extend to areas within the vehicle. *United States v. Robinson*, 414 U.S. 218 (1973). While persons may legitimately expect privacy in their vehicles to a limited extent, it is unreasonable to expect immunity from police contact, even for closed areas within the vehicle. These areas might need to be examined after an accident, might be searched incident to an arrest, etc.

As this Court has stated, "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny." *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974). "The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building." *Almeida-Sanchez v. United States*, 413 U.S. 268 (1973). (Powell, J., concurring). While the expectation of privacy may be greater in a glove compartment than in other areas inside a vehicle, the glove compartment is known as an area where valuable items are frequently kept, and it was therefore reasonable for the inventory to include that area.

In summary, the inventory conducted in this case was reasonable because it was for a valid noncriminal purpose involving normal noninvestigative police functions. It was conducted primarily to guard against theft of personal property in the vehicle, and its scope was limited to items in plain view and in the unlocked glove compartment inside the automobile, the contents of which are frequently valuable and which are as accessible to an intruder as other areas in plain view within the vehicle. The need to secure the property was increased by the fact that there had been prior thefts from vehicles at the impound lot. Further, the police department was small and could not post a guard at the lot. The owner could not be consulted in regard to the property inside the vehicle.

The intrusion was not upon the person or residence of the Respondent, but into his automobile, in which there is a lesser expectation of privacy.

The inventory is not rendered an unjustice to the owner because of the fact that it is intended to protect him. Nor does it result in any unequal or inconsistent treatment between those who are suspected of criminal behavior and those who are not.

Opening the glove compartment of Respondent's vehicle was reasonable government conduct that brought the officer into a position from which he observed evidence of a crime. The evidence is not the produce of an illegal search and therefore may be admitted into evidence in a criminal prosecution.

For these reasons, the Petitioner, the State of South Dakota, respectfully requests that this Court reverse the decision of the court below.

Respectfully submitted,

WILLIAM J. JANKLOW
ATTORNEY GENERAL

EARL R. METTLER
Assistant Attorney General
State Capitol Building
Pierre, S.D. 57501